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BEFORE THE BOARD OF OIL, GAS & MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB, et al, Petitioners, v. UTAH DIVISION OF OIL, GAS & MINING, Respondent, ALTON COAL DEVELOPMENT, LLC and KANE COUNTY, UTAH, Respondent/Intervenors.	**UTAH DIVISION OF OIL, GAS & MINING'S MEMORANDUM IN RESPONSE TO ALTON COAL DEVELOPMENT'S RENEWED MOTION FOR LEAVE TO CONDUCT DISCOVERY** Docket No. 2009-019 Cause No. C/025/005

The Utah Division of Oil, Gas, and Mining (Division), by and through its undersigned counsel, hereby submits its Response to Petitioners' Motion to Dismiss Alton Coal Development LLC's (Alton) Motion for Discovery and to Petitioners' Response. This Response is filed pursuant to the parties' Stipulation Concerning Responses to Alton's Petition for Fees and

Briefing on Alton's Renewed Motion for Discovery. The Stipulation provides that if the Division elects to file a brief on the motion for discovery its brief will be due on May 15, 2014.

The Division is charged by statute with advising the Board and is granted authority with the Board to regulate coal mining and reclamation operations. *See* Utah Code. Ann. §§ 40-6-16 and 40-10-2(1) (West 2013). In that role, and in light of recent direction from the Board that "the Division will have a continuing role in this phase of the case in assisting the Board to make informed decisions concerning issues of general applicability such as when discovery is appropriate[,]" Interim Order, filed February 20, 2014, the Division files this Response.

ARGUMENT

In its Supplemental Memorandum in Support of its Renewed Motion for Leave to Conduct Discovery, Alton argues that there are three reasons to conduct discovery. "First, the information sought regarding Petitioners' motives is essential to the Board's resolution of the fee petition . . . ." Alton Supp. Memo. at 4. "Second, it would have been premature to have any analysis of Petitioners' motive prior to the final determination on the validity of Petitioners' challenge to the mine permit[.]" *Id.* "Third, the existing record is limited . . . [to] the various claims regarding the mine permit and contains no information . . . on Petitioners' purpose or motive in bringing their challenge." *Id.* The Division believes these points are true with respect to the *subjective* element of bad faith, but disagrees that further discovery is necessary to determine whether there is *objective* bad faith in this case.

I. Further Discovery is Not Needed to Determine Objective Bad Faith.

As the Division argued in its Memorandum in Response to Petitioners' Motion to Dismiss, filed May 2, 2014, Rule B-15 must contain both an objective and subjective element of

bad faith in order to be a workable standard. *Id.* at 4-5. The objective element analyzes whether the merits of the claim were supportable, while the subjective element addresses whether the party brought the claims to harass or waste time and resources. The Division pointed out that the objective element should be analyzed first, before subjective intent, in order to decide whether the claims were frivolous or lacking basis in fact or law. Only if the Board determines that objective bad faith exists in this case (i.e., Sierra Club's claims lacked merit) should subjective intent be addressed.

In deciding whether there is objective bad faith, no additional discovery is needed. This is because the "without merit" determination is a question of law that can be decided on the existing record. *Broadwater v. Old Republic Sur.*, 854 P.2d 527, 534 (Utah 1993) (declining to remand to lower court for further discovery because "nothing *in the record* supports a conclusion that the defense was without merit." (emphasis added)); *Jeschke v. Willis*, 811 P.2d 202, 203 (Utah App. 1991) ("The 'without merit' determination is a question of law, and therefore we review it for correctness.").

If the Board finds that any of Sierra Club's claims are frivolous or lacking basis in law or fact, the Board may then analyze the subjective element of bad faith. However, if the Board finds that none of the claims raised by Sierra Club were frivolous or lacking basis in law or fact, the inquiry ends, and there is no need for additional discovery.

II. If the Board Determines Objective Bad Faith Exists in this Case, Further Discovery Would Be Needed to Determine Subjective Bad Faith.

Unlike the objective element of bad faith, the subjective element is not a matter of law that can be decided on the existing record. Because prior discovery in this matter was limited, at least some degree of limited discovery should be allowed to determine subjective bad faith, but

only if the Board determines that it is necessary to inquire into the subjective element. The question is not whether the parties were on notice of the B-15 standard, but whether they were authorized to inquire into subjects outside of those listed in the Stipulated Discovery Plan. They were not, since the goal of the Stipulated Discovery Plan was to limit the scope of discovery. *See* Order Approving Stipulated Discovery Plan, filed February 11, 2010 ("Stipulated Discovery Plan") (limiting scope of discovery "upon *the following* terms and conditions" (emphasis added)). Therefore, it necessarily follows that the parties were not authorized to inquire into motives during prior discovery.

It is important to note that the Stipulated Discovery Plan established a discovery scheme that was narrower than in the traditional civil discovery context under Rule 26. Under traditional civil discovery, anything that is relevant to the case is discoverable. Utah R. Civ. P. 26(b) ("Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below."). However, under the Stipulated Discovery Plan, the parties were limited to inquiring into certain, defined topics, and therefore Alton was not permitted to ask questions related to Sierra Club's motive or intent in bringing the challenge.

Thus, in contrast to the discovery in the cases cited by Sierra Club, which operated under the general discovery rules, this case operated under a special scheme that did not contemplate inquiry into motive. For these reasons, the Division believes that at least some degree of discovery should be allowed for Alton to inquire into the subjective element of bad faith, provided, of course, that the Board has already determined such an inquiry is warranted.

Furthermore, the Division believes that discovery, if any, should be limited by Rule 26's protections of privileged material. Alton should not be able to inquire into obviously-protected attorney-client discussions or other privileged communications, but it should be able to find out if it was the target of an unjustified attack that was meant to harass, embarrass, and delay Alton and the other parties involved. Although Sierra Club argues that the entire purpose of any challenge is to block or hinder, Petitioners' Opposition to Alton Coal Development's Renewed Motion for Leave to Conduct Discovery at 3, n.1, it also acknowledges there is a difference between challenging for a legitimate purpose and challenging for an ulterior motive. *Id.*

Alton has alleged that it was the subject of an attack based on an ulterior motive. In support of that argument, Alton has offered allegations that Sierra Club was actively campaigning against Alton and the entire coal industry by posting videos on the internet and sending other communications through other media. If Alton is correct that those actions exhibited the true purpose in filing the challenge (i.e., the purpose of the challenge was to hinder for the sake of hindering or harassing versus legitimate concern regarding the approval), Alton should be able to engage in limited discovery to attempt to prove that theory. If the theory is unfounded, it will become evident very early in the discovery process.

While it is true that the First Amendment to the United States Constitution allows a party to voice opinions and petition the government for a redress of grievances, it does not reach so far as to allow abuse of adjudicative processes. That is, a party cannot invoke the First Amendment if it has abused the adjudicative forum to advance its viewpoints for improper and wasteful purposes. *See Protect Our Mountain Environment, Inc. v. District Court In and For Jefferson County*, 677 P.2d 1361, 1364-1369 (Colo. 1984) ("The right to petition government, however, is

not without limits. The First Amendment does not grant a license to use the courts for improper purposes."); *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 743 (1983) (explaining that knowingly frivolous claims are not within the scope of First Amendment protection). Granted, there is a heightened standard when a party alleges that their opponent should not be protected by the First Amendment, *see P.O.M.E.*, 677 P.2d at 1369 (describing three-prong heightened standard), but the First Amendment does not provide blanket protection to every challenge brought before an adjudicatory body.

To be sure, the Division is not affirmatively alleging that that Sierra Club filed its claims in subjective bad faith. However, if the Board determines that Sierra Club's claims lacked objective merit, Alton should be able to seek further evidence about Sierra Club's subjective intent in bringing those claims. Limited discovery would help resolve the question of whether the claims were brought with a proper or improper purpose.

CONCLUSION

If the Board finds that none of the claims raised by Sierra Club were frivolous or lacking basis in law or fact, the inquiry ends and there is no need to conduct additional discovery. However, if the Board finds that any of Sierra Club's claims were objectively frivolous or lacking basis in law or fact, the Board should then analyze the subjective element of bad faith by allowing limited discovery. Limited discovery, if authorized, would not run afoul of the First Amendment, but would help maintain the integrity of the Board's administrative processes by ensuring that only meritorious and good faith claims are brought before it.

SUBMITTED this 14th day of May, 2014.

Digitally signed by Kassidy J. Wallin
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **RESPONSE TO ALTON COAL DEVELOPMENT'S RENEWED MOTION FOR LEAVE TO CONDUCT DISCOVERY** for Docket No. 2009-019, Cause No. C/025/0005 to be mailed with postage prepaid, this 15th day of May, 2014, to the following:

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